BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
BAE SYSTEMS IESI, Inc. (Successor to Lockheed Martin Corporation Sanders); NM ID NO. 02-278265-00-6
TO DENIAL OF CLAIM FOR REFUND OF
TAXES PAID FOR REPORTING PERIODS
OCTOBER 1998 THROUGH NOVEMBER 2000

07-06

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on April 19, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, Special Assistant Attorney General. BAE Systems IESI, Inc. (the successor to Lockheed Martin Corporation, Sanders) was represented by Richard Gasparoni, its Group Tax Manager. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1998, Lockheed Martin Corporation Sanders ("Sanders"), a division of Lockheed Martin Corporation, entered into a research and development contract with the United States Air Force to develop certain hardware and accompanying software known as an "Improved Space Architecture Concept Testbed."

2. Under the contract, the research and development services were to be performed in New Hampshire, with the testbed delivered to New Mexico for first use by the Air Force Research Laboratory in New Mexico.

3. It was originally determined by Sanders and the Air Force contracting officer that New Mexico gross receipts tax would be due on the progress payments for the project. As a result,

gross receipts taxes were paid on progress payments received during reporting periods beginning in October 1998.

4. In November 2000, Sanders was purchased by BAE Systems IESI, Inc.

5. On August 28, 2003, Sanders' contract with the Air Force was amended to provide that the first use of the testbed would occur in New Hampshire and not in New Mexico.

6. Based on the contract amendment, BAE Systems (as successor in interest to the Sanders contract) filed a claim for refund of $230,347.92 of gross receipts taxes paid for reporting periods December 2000 through August 2003.

7. On December 22, 2004, the Department granted the refund claim and issued a check to BAE Systems in the amount of $230,347.92.

8. On March 2, 2005, BAE Systems filed a claim for refund of $276,182.99 of gross receipts taxes paid for reporting periods October 1998 through November 2000.

9. On June 15, 2005, the Department denied BAE Systems' claim because it was not filed within the three-year statute of limitations set out in NMSA 1978, § 7-1-26.

10. On September 12, 2005, BAE Systems filed a written protest to the denial of its claim for refund.

DISCUSSION

The issue to be determined is whether the Department properly denied BAE Systems' ("the Taxpayer") March 2, 2005 claim for refund of gross receipts taxes paid for reporting periods October 1998 through November 2000. The basis for the Department's denial was the expiration of the limitations period set out in NMSA 1978, § 7-1-26 (D), which provides, in pertinent part:

> [N]o credit or refund of any amount may be allowed or made to any person unless as the result of a claim made by that person as provided in this section:
>
> (1) within three years of the end of the calendar year in which:

(a) the payment was originally due or the overpayment resulted from an assessment by the department pursuant to Section 7-1-17 NMSA 1978, whichever is later;

Based on the statute, the last date for claiming a refund of the gross receipts taxes at issue here was as follows:

Reporting Periods (tax due on the 25th of the following month)	*Expiration of 3-year Limitations Period*
October and November 1998	December 31, 2001
December 1998-November 1999	December 31, 2002
December 1999-November 2000	December 31, 2003

ESTOPPEL. The Taxpayer does not dispute that its March 2, 2005 refund claim was untimely, but argues that the Department should be estopped from denying the refund based on equitable considerations. As a general rule, courts are reluctant to apply the doctrine of estoppel against the state. This rule is given even greater weight in cases involving the assessment and collection of taxes; in such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 230-231, 770 P.2d 873, 875-876 (1989).

Estoppel Based on Statute. NMSA 1978, § 7-1-60 provides for estoppel against the Department in two circumstances: when the taxpayer acted in accordance with a Department regulation or when the taxpayer acted in accordance with a revenue ruling specifically addressed to the taxpayer. Here, the Taxpayer maintains that its overpayment of gross receipts taxes was made in accordance with Department Regulations 3.2.1.18 and 3.2.1.14 NMAC, which define taxable gross receipts to include receipts from research and development services performed outside New Mexico when the product of those services is initially used in New Mexico. Based on its reliance on these

regulations, the Taxpayer concludes that § 7-1-60 estops the Department from refunding the overpayment.

The problem with this argument is that the regulations cited by the Taxpayer conform to the statutory definition of gross receipts and are a correct statement of the law. The Taxpayer concedes that at the time it paid the gross receipts taxes at issue, its contract with the Air Force provided for the product of the Taxpayer's research and development services to be delivered and initially used in New Mexico. For this reason, the Taxpayer cannot claim that its original payment of tax was made in error or that it was misled by the Department's regulations. The real cause of the Taxpayer's overpayment was the federal government's belated decision to amend the contract to change the place of initial use of the testbed from New Mexico to New Hampshire. This change was not made in reliance on any Department regulation, and the estoppel provisions of § 7-1-60 do not apply.

Equitable Estoppel. New Mexico case law provides for estoppel against the state where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State, Human Servs. Dep't,* 1998-NMSC-011, ¶ 17, 125 N.M. 140, 958 P.2d 98. When estoppel is invoked to avoid application of a statute of limitations, the issue is whether the party to be estopped has taken some action to prevent the other party from bringing suit within the prescribed period. *Kern v. St. Joseph Hospital, Inc.,* 102 N.M. 452, 455-456, 697 P.2d 135, 138-139 (1985). In addition, the party seeking estoppel must demonstrate "affirmative misconduct on the part of the government." *Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 27, 136 N.M. 440, 99 P.3d 690 (quoting *Gallegos v. Pueblo of Tesuque,* 2002-NMSC-012, 132 N.M. 207, 46 P.3d 668).

As discussed above, the Taxpayer's late-filing of its refund claim was not attributable to any action or misconduct of the Department. The amendment of the federal contract to change the place of delivery and initial use of the testbed was a matter between the Taxpayer and the Air Force.

Given these circumstances, there is no basis to estop the Department from enforcing the clear statutory directive of § 7-1-26, which provides that no refund "of any amount" may be made to any person unless the claim is filed within three years of the end of the calendar year in which the payment was made.

EQUITABLE TOLLING. The Taxpayer believes that if estoppel does not apply, the statute of limitations should be equitably tolled when the event giving rise to a refund occurs after the limitations period has expired. As the Department points out, however, both federal and state courts have consistently rejected application of equitable tolling to tax refund cases. In *United States v. Brockamp,* 519 U.S. 347 (1997), the United States Supreme Court upheld strict enforcement of the three-year period for seeking federal tax refunds, even though the taxpayer suffered from a mental disability that prevented him from filing a timely claim. Writing for a unanimous Court, Justice Breyer explained their decision as follows:

> To read an "equitable tolling" exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for "equitable tolling" which, upon close inspection, might turn out to lack sufficient equitable justification.... The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system. At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.

519 U.S. at 352-353. Congress responded to *Brockamp* by amending § 6651 to permit tolling when a taxpayer is prevented by disability from seeking a tax refund. In *Doe v. KPMG, LLP*, 398 F.3d 686, 689 (5th Cir. 2005), the Fifth Circuit Court of Appeals found that Congress's decision to set out specific exceptions to the statute of limitations on refunds—without adding a general equitable tolling provision—further justified the Supreme Court's reading of the statute in *Brockamp*,

concluding that Congress "does not intend courts to invoke equitable tolling to alter the plain text of the statutes at issue." In *Doe*, the court rejected the government's request for equitable tolling, finding that the IRS could not rely on general equitable principles to extend the period for issuing assessments, even when the taxpayers were shown to have "less than clean hands." *Id*. at 690.

State courts have been equally strict in enforcing statutes of limitation affecting the administration of state taxes. In *DaimlerChrysler Corp. v. Commonwealth*, 885 A.2d 117 (Pa.Cmwlth. 2005) the Pennsylvania court considered a fact pattern similar to the one in this case. There, an automobile manufacturer sought a refund of sales taxes paid on the sale of vehicles the manufacturer was subsequently required to repurchase under the state's lemon law. Because the repurchase occurred after the three-year statute for obtaining refunds had expired, the manufacturer argued that statute should be equitably tolled until the date the right to the refund first accrued. The court disagreed, noting that statutes of limitation

> Are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id., FN 10 at 121, quoting from *Ciccarelli v. Carey Canadian Mines, Ltd.,* 757 F.2d 548 (3d Cir.1985). *See also*, *Neer v. State ex rel. Oklahoma Tax Commission*, 982 P.2d 1071 (Okla. 1999) (denying late-filed income tax refund based on credit for taxes paid to another state, even though the right to the refund accrued after expiration of Oklahoma's deadline for claiming refunds); *CIG Exploration, Inc. v. State, Dept. of Revenue*, 880 P.2d 601 (Wyo. 1994) (denying late-filed severance tax refund resulting from government's order requiring taxpayer to retroactively reduce its natural gas prices, even though order was entered after expiration of Wyoming's deadline for claiming

refunds); *American Smelting & Refining Co. v. State Tax Commission*, 397 P.2d 67 (Utah 1964) (denying late-filed corporate income tax refund resulting from IRS adjustment, even though adjustment was made after expiration of Utah's deadline for claiming tax refund).

New Mexico courts have also applied a strict construction to statutes governing tax refunds. In *Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 16, 136 N.M. 440, 99 P.3d 690, the New Mexico Court of Appeals noted that the purpose of the deadlines set out in § 7-1-26 "is to avoid stale claims, which protects the Department's ability to stabilize and predict, with some degree of certainty, the funds it collects and manages." In *Kilmer*, the court rejected the taxpayer's argument that the Department had implied authority to grant a refund after the statutory deadline, holding that an administrative agency may not exercise authority beyond the powers granted to it by the state legislature. *Id*. at ¶ 24. This is consistent with the New Mexico Supreme Court's decision in *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022, 961 P.2d 768, 774-775, where the court made the following observation concerning the power of administrative agencies:

> Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.

Neither the Department nor its hearing officer has authority to question the wisdom of the laws passed by the legislature or to modify the application of those laws based on a taxpayer's individual circumstances. *See*, *AA Oilfield Service v. New Mexico State Corporation Commission,* 118 N.M. 273, 881 P.2d 18 (1994) (an administrative agency's quasi-judicial powers do not include authority to grant an equitable remedy). Given the clear time limitations set out in § 7-1-26, the Taxpayer's refund claim was properly denied.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the denial of its claim for refund of gross receipts taxes, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer's claim for refund of gross receipts taxes paid for reporting periods October 1998-November 2000 is barred by the limitations period set out in NMSA 1978, § 7-1-26.

C. The Department is not estopped from denying the Taxpayer's claim for refund.

D. The Department does not have the authority to override the provisions of New Mexico's tax laws to toll the limitations period set out in NMSA 1978, § 7-1-26.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DATED April 23, 2007.